ILE COPY

Office-Supreme Court, U.S.
FILED
JAN 4 1961
JAMES R. BROWNING, Clerk

No. 126

Supreme Court of the United States

OCTOBER TERM, 1960

LAURENS FEDERAL SAVINGS AND LOAN ASSOCIATION, PETITIONER,

versus

SOUTH CAROLINA TAX COMMISSION, AND OTIS W. LIVINGSTON, CHAIRMAN, ET AL., RESPONDENTS

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

BRIEF FOR PETITIONER

FRANK K. SLOAN,
ERNEST L. FOLK III,
Attorneys for Petitioner, Laurens Federal Savings & Loan Association,
900 Security Federal Building,
Columbia, South Carolina.

W. HUMMEL HARLEY,
Laurens, S. C.,
THOMAS H. POPE,
ROBERT D. SCHUMPERT,
REMBERT D. PARLER,
Newberry, S. C.,
Of Counsel.

The R. L. Bryan Company, Legal Printers, Columbia, S. C.

INDEX

	Page
Opinions Below	1
Jurisdiction	1
Question Presented	2
Statutes Involved	2
Statement	4
Argument	9
I	10
II	15
III	17
Conclusion	23

CITATIONS

Cases:

	Page
Carson v. Roane-Anderson Co., 342 U. S. 232	15
Commissioner v. Dravo, 119 F. (2d) 97	(n. 10) 12
Esso Standard Oil Co. v. Evans, 345 U. S. 495	15
Fahey v. Mallonee, 322 U. S. 245	20
Fahey v. O'Melveny & Myers, 200 F. (2d) 420	20
Federal Land Bank v. Crosland, 261 U. S. 374	11, 14
Laflin & Rand Powder Co. v. Burkhardt, 97 U. S. 110	12
Pittman v. Home Owners Loan Corp., 308 U. S. 21	9, 10, 11, 12, 13, 14, 15, 17, 18, 19, 23
Socony Vacuum Oil Co. v. C. M. Johnston & Sons, 103 F. (2d) 275	(n. 7) 12

Statutes:

Sec. 10 Federal Home Loan Bank Act of 1932, 47 Stat. 731, 12 U. S. C. 1430	2, 9
Sec. 13 Federal Home Loan Bank Act of 1932, 47 Stat. 735, 12 U. S. C. 1433	2, 7, 9, 12, 13, 14, 15, 17
Sec. 5(h) Home Owners Loan Act of 1933, 48 Stat. 133, 12 U. S. C. 1464(h)	3, 7, 9, 17, 18, 19
Section 65-688 of the Code of Laws of South Carolina, 1952	4, 8

Miscellaneous:

Congressional Record, Vol. 75, pp. 13, 112, et seq.	12, 13, 14, 16, 21
Federal Home Loan Bank Board, Annual Report, 1959, pp. 15, 49, 55	5, 6, 7, 8
Wall Street Journal, Dec. 7, 1960, p. 10	21
Words and Phrases, Vol. 2A, pp. 117-119	12

No. 126

Supreme Court of the United States

OCTOBER TERM, 1960

LAURENS FEDERAL SAVINGS AND LOAN ASSOCIATION, PETITIONER,

versus

SOUTH CAROLINA TAX COMMISSION, AND OTIS W. LIVINGSTON, CHAIRMAN, ET AL., RESPONDENTS

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the Supreme Court of South Carolina (R. 15-23) is reported at 236 S. C. 2 and at 122 S. E. (2d) 716.

JURISDICTION

The judgment of the Supreme Court of South Carolina, contained in the opinion (R. 15-23), was entered on February 5, 1960. A timely petition for rehearing was denied on February 26, 1960 (see R. 13-15). The time for filing a petition for writ of certiorari was extended by Mr. Chief

Justice Warren on May 2, 1960, to June 4, 1960 (R. 23-24). The petition was filed on June 3, 1960, and was granted on October 10, 1960 (R. 24; 81 S. Ct. 47). The jurisdiction of this Court rests on 28 U.S.C. 1257 (3) and 2101 (e).

QUESTION PRESENTED

Whether South Carolina may tax the "note or obligation" required by Federal law (12 U.S.C. 1430 (c)) to secure Federal Home Loan Bank "advances" which are specifically exempted from State taxation by 12 U.S.C. 1433.

STATUTES INVOLVED

Section 10 of the Federal Home Loan Bank Act of 1932, 47 Stat. 731, 12 U.S.C. 1430, as amended, provides in pertinent part as follows:

> (a) Each Federal Home Loan Bank is authorized to make advances to its members upon the security of home mortgages, or obligations of the United States, or obligations fully guaranteed by the United States, subject to such regulations, restrictions, and limitations as the Board may prescribe. • • •
>
> (c) Such advances shall be made upon the note or obligation of the member or nonmember borrower secured as provided in this section, bearing such rate of interest as the board may approve or determine, and the Federal Home Loan Bank shall have a lien upon and shall hold the stock of such member as further collateral security for all indebtedness of the member to the Federal Home Loan Bank. • • •

Section 13 of the Federal Home Loan Bank Act of 1932, 47 Stat. 735, 12 U.S.C. 1433 (hereinafter cited as "Section 1433"), as amended, provides:

> Any and all notes, debentures, bonds, and other such obligations issued by any bank, and consolidated Federal Home Loan Bank bonds and debentures, shall be exempt both as to principal and interest from all

taxation (except surtaxes, estate, inheritance, and gift taxes) anw or hereafter imposed by the United States, by any Territory, dependency, or possession thereof, or by any State, county, municipality, or local taxing authority. The bank, including its franchise, its capital, reserves, and surplus, its advanees, and its income, shall be exempt from all taxation now or hereafter imposed by the United States, by any Territory, dependency, or possession thereof, or by any State, county, municipality, or local taxing authority; except that in (*sic*) any real property of the bank shall be subject to State, Territorial, county, municipal, or local taxation to the same extent according to its value as other real property is taxed. The notes, debentures and bonds issued by any bank, with unearned coupons attached, shall be accepted at par by such bank in payment of or as a credit against the obligation of any homeowner debtor of such bank.

Section 5(h) of the Home Owners Loan Act of 1933, 48 Stat. 133, 12 U.S.C. 1464(h) as amended (hereinafter cited as "Section 1464(h)"), provides:

> (h) Such associations, including their franchises, capital, reserves, and surplus, and their loans and income, shall be exempt from all taxation now or hereafter imposed by the United States (except the taxes imposed by sections 1410 and 1600 of Title 26 with respect to wages paid after December 28, 1939, for employment after such date, and except, in the case of taxable years beginning after December 31, 1951, income, war-profits, and excess-profits taxes), and all shares of such associations shall be exempt both as to their value and the income therefrom from all taxation (except surtaxes, estate, inheritance and gift taxes) now or hereafter imposed by the United States; and no State, Territorial, county, municipal, or local taxing authority shall impose any tax on such associations or their franchise, capital, reserves, surplus, loans, or income greater than that imposed by such authority on

other similar local mutual or cooperative thrift and home financing institutions.

Section 65-688 of the Code of Laws of South Carolina of 1952 provides as follows:

> The tax on promissory notes, except bank notes issued for circulation and executory contracts for the payment of money which are executed or carried out in an instrument of writing to which documentary stamps are affixed, nonnegotiable notes, written obligations to pay money, except as may otherwise be provided for in this chapter, assignments of salaries, wages or other compensation and mortgages which incorporate the certificate of indebtedness not otherwise shown in a separate instrument, and each renewal of any thereof, shall be for a sum not exceeding one hundred dollars, four cents and for each additional one hundred dollars, or fractional part thereof, four cents.

STATEMENT

Petitioner, a Federal savings and loan association with its principal place of business at Laurens, South Carolina ("The Association") (R. 3), was chartered pursuant to 12 U.S.C. 1464(a), and is a member of the Federal Home Loan Bank of Greensboro, North Carolina ("The Bank") as required by 12 U.S.C. 1464(f). Under protest, the Association paid State documentary taxes on the notes which 12 U.S.C. 1430 (c) required it to issue in order to obtain Bank "advances". In this action petitioner sought, but was denied, recovery of the taxes paid.

In order to place in proper context the issue in the case, we summarize briefly the salient features of the Federal Home Loan Bank system and its relation to the Federal savings and loan associations.

The Federal Home Loan Bank System: [1] In 1932, Congress established [2] the Federal Home Loan Bank system, which consists of the Federal Home Loan Bank Board ("The Board") (constituted pursuant to 12 U.S.C. 1437), and a number of Federal Home Loan Banks located in as many districts (see 12 U.S.C. 1423), including the Federal Home Loan Bank of Greensboro, North Carolina. Upon its organization, each bank issued capital stock (12 U.S.C. 1426) to which eligible savings and loan institutions (see 12 U.S.C. 1424) could subscribe and thus become "members" of the Bank (see 12 U.S.C. 1426(c)). Upon incorporation, a Federal savings and loan association, such as petitioner "shall become automatically a member" of the Bank of the district in which it is located (12 U.S.C. 1464(f); see 12 U.S.C. 1424) [3] by subscribing to a determinate number of shares in the Bank (12 U.S.C. 1426(c) and paying for these shares (12 U.S.C. 1426(d)). Petitioner is a member of the Greensboro Bank (R. 2, 3).[4]

In 1933, Congress authorized [5] the establishment of "associations to be known as 'Federal Savings and Loan Associations'." They are intended to function as "local mutual thrift institutions in which people may invest their funds" and to facilitate "the financing of homes" (12 U.S.C. 1464 (a); see also 12 U.S.C. 1465). "The entire capital of [these]

---

[1] For a comprehensive account of the organization and activities of the Federal Home Loan Bank system, see 1959 ANN. REP. FEDERAL HOME LOAN BANK BOARD, esp. at 15-16, 49-51, 55-56.

[2] This statute is the Federal Home Loan Bank Act of 1932, 47 Stat. 725 *et seq.*, now codified, with amendments, as 12 U.S.C. 1421-1449.

[3] A State-chartered institution may "become a member of or a non-member borrower of," the appropriate Bank if it meets the requirements specified in 12 U.S.C. 142 (a)

[4] A Federal savings and loan association may not unilaterally withdraw from its Bank membership, unlike other Bank members who may sever relationship on six months notice. 12 U.S.C. 1426 (c)

[5] This statute was the comprehensive emergency legislation known as the Home Owners Loan Act of 1933, 48 Stat. 128. A number of its provisions, including the establishment of the Home Owners Loan Corporation, have since been superseded or repealed (see note 18, *infra*) but those sections relating to Federal savings and loan associations have been codified, with amendments, as 12 U.S.C. 1461-1468.

associations, all of which are mutual institutions, is owned by their members in the form of savings accounts. These accounts are nonassessable and participate equally in the earnings of the association. Dividends are distributed semiannually at a rate determined by the directors on the basis of net earnings. • • • Withdrawal of accounts, in full or in part, may be made by the owner, in accordance with charter and regulatory provisions." 1959 ANN. REP. FED. HOME LOAN BANK BD. 49-50. Additional funds are furnished to Federal associations by United States government purchases of "preferred shares" (12 U.S.C. 1464(g)) and "full paid income shares" (12 U.S.C. 1464(j)).

The Federal associations' ordinary functions are to lend funds secured by their shares or by first mortgages upon homes (12 U.S.C. 1464(c)), although an association may also be required to serve as a "fiscal agent of the Government" or as "agent for any other instrumentality of the United States" (12 U.S.C. 1464(k)). The Federal Home Loan Bank Board supervises association activities. Association charters are granted only to "persons of good character and responsibility", and only if "in the judgment of the Board" an association is needed and will likely prove useful and successful in its operations. 12 U.S.C. 1464(e). The Board is specifically authorized to prescribe "rules and regulations" governing the "organization, incorporation, examination, operation, and regulation" of Federal associations, 12 U.S.C. 1464(a). Finally, the Board may appoint a "conservator or receiver" of an association for various reasons (12 U.S.C. 1464(d) (2), including "unsafe or unsound operation" (12 U.S.C. 1464(d)(2)(iv)).

Member and nonmember Bank borrowers, including Federal associations, are "entitled to apply in writing for advances" from the Bank. (12 U.S.C. 1429.) Such "advances" "shall be made upon the note or obligation" of the

borrower (12 U.S.C. 1430 (e)), and are ordinarily secured by home mortgages or by Government issued or guaranteed obligations (12 U.S.C. 1430(e) ; see also 1430(b)). A member securing such an "advance" shall enter into "a primary and unconditional obligation" to repay it with interest and costs, etc. (12 U.S.C. 1430(d)).

"Advances" [6] by the Bank are "exempt from all taxation, now or hereafter imposed * * * by any State, county, municipality, or local taxing authority," as well as from Federal taxation. 12 U.S.C. 1433. As for Federal associations, 12 U.S.C. 1464(h) forbids any "State, Territorial, county, municipal, or local taxing authority" to impose a discriminatory tax upon "such associations or their franchise, capital, reserves, surplus, loans or income * * *." Associations are (with minor exceptions) relieved of all Federal taxation (12 U.S.C. 1464(h)).

Savings and Loan Associations in South Carolina: As of December 31, 1959, there were in South Carolina 43 Federal, and 27 State chartered associations,[7] all of which are either members of, or borrowers from, the Greensboro Bank. As of the same date, total outstanding Bank advances to these associations were $21,076,000,[8] for which "notes or obligations" in the same dollar amount were required by 12 U.S.C. 1430(e). South Carolina, as do at least two other States,[9] imposes a documentary stamp tax upon promissory

---

[6] Besides "advances," 12 U.S.C. 1433 also forbids local taxation on "[t]he Bank, including its franchise, its capital, reserves, and surplus * * * and its income * * *." However, 1433 provides one exception to the general interdiction on local taxation, by specifically permitting local taxes on the Bank's real property.

[7] See 1959 ANN. REP. FEDERAL HOME LOAN BANK OF GREENSBORO, N. C. (hereinafter cited as ANN. REP. (GREENSBORO) at 6. The number has steadily grown. For 1958, there were 42 Federal and 25 State association members (1958 ANN. REP. (GREENSBORO) at 6), and for 1957, the corresponding figures were 41 and 22 respectively (1957 ANN. REP. (GREENSBORO) at 10).

[8] This figure appears in 1959 ANN. REP. (GREENSBORO) at 14-15.

[9] See PURDON'S PENNA. STATS. ANN. § 72-203(p) (1949); FLA. STATS. § 201.08(1) (1955).

notes given by borrowers (S. C. CODE § 65-688 (1952), including "notes or obligations" given by associations securing "advances" from the Greensboro Bank. On the "advances" outstanding on December 31, 1959, the total South Carolina Tax was $8,430.40. This figure is understated, since the dollar volume of Bank advances throughout a calendar year—including new advances and renewals—is appreciably greater than the volume of advances outstanding on a given date.[10]

Laurens Federal Savings and Loan Association: Petitioner is a duly organized Federal association, and a member of the Greensboro Bank. Between August 12, 1953 and October 7, 1957, it obtained ten advances aggregating $5,675,000 from the Greensboro Bank (R. 7), each time executing for the advance the required "note or obligation" properly secured. Respondent South Carolina Tax Commission assessed taxes of $2,270.00 upon the "notes" given by petitioner to the regional bank at Greensboro (R. 5). Petitioner paid the tax under protest (R. 6) and timely filed suit in the Court of Common Pleas of Laurens County to recover the amount of the tax, claiming in its complaint (R. 3-7), that the South Carolina documentary stamp tax is "in direct violation of the tax exemption granted this plaintiff and the Federal Home Loan Bank of Greensboro by the Federal Home Loan Bank Act, 12 U.S.C.A. 1421

[10] The aggregate dollar volume of advances to South Carolina associations is not available. The relatively larger figure appears from available statistics respecting the total volume of advances from the Greensboro Bank to all associations in its district (roughly the Southeastern part of the country). Thus, as of December 31, 1959, outstanding advances were $234,430,250. 1959 ANN. REP. (GREENSBORO) at 12; see also 1959 ANN. REP. FHLB BD. at 57. But the District's aggregate volume of advances for 1959 was $217,300,000 in "new advances", and $115,500,000 in "renewals", for a total of $332,800,000. 1959 ANN. REP. (GREENSBORO) at 5. The aggregate volume of "new advances" and "renewals" is not furnished on a state-to-state basis, as are the figures for advances outstanding on the last day of the calendar year. Nor is there a state-to-state breakdown of the volume of advances to Federal and State chartered associations, although for the nation as a whole the federal-state ratio is roughly 3 to 2. 1959 ANN. REP. FHLB BD. at 18.

et seq. • • • (R. 6). Respondent's Answer (R. 7-8) asserted the state tax to be "just, legal and proper and specifically authorized by the • • • Home Owners Loan Act of 1933, more specifically, 12 U.S.C.A. 1464 (h)" (R. 8). The trial court held (R. 8-11) and the Supreme Court of South Carolina in its opinion agreed (R. 15-23), that the State tax was authorized by Federal law.

The State Court Opinion: The court concluded that the language of 12 U.S.C. 1433 granting "immunity • • • from taxation applies only to the Federal Home Loan Bank" (R. 18), and that South Carolina had "not sought to place any documentary tax" upon the Bank but had assessed it only against petitioner (*ibid.*). The opinion distinguished this Court's decision in *Pittman v. Home Owners Loan Corp.*, 308 U. S. 21 (1939)—which invalidated a Maryland documentary tax on a mortgage securing a HOLC loan and offered for recordation by HOLC—as "not applicable under the factual situation here," on the theory that the *Pittman* mortgage "was offered for record by the Home Owners' Loan Corporation and not by the borrower association" (R. 19).

ARGUMENT

12 U.S.C. 1433 (Section 13 of the Federal Home Loan Bank Act of 1932, 47 Stat. 725 at 735), provides that "advances" by the Federal Home Loan Bank "shall be exempt from all taxation now or hereafter imposed • • • by a State, county, municipality, or local taxing authority." 12 U.S.C. 1430 (Section 10 of the same Act) authorizes the Bank "to make advances to its members," including Federal associations such as petitioner, only "upon the note or obligation of the member • • • borrower" properly secured (see 12 U.S.C. 1430(a)). South Carolina has imposed its documentary stamp tax upon the "notes or obligations" without which an association cannot obtain the needed "ad-

yances" which Congress intended to be available to it through the Federal Home Loan Bank system.

This tax, we submit, is an indirect although nonetheless forbidden tax upon the "advance" itself, since the "note or obligation" is essential to obtaining the "advance", and since in any event the taxed "note or obligation" is an integral part of the entire loan transaction which Congress intended to remain tax exempt. Indeed, the tax is precisely determined by the amount of the "advance", since the association's "note or obligation" is necessarily given for the exact amount of the "advance" made by the Bank. The invalidity of such a tax is amply demonstrated by the statutory language, by applicable decisions of this Court, and by the legislative history and policy of the statute.

I.

The decision of the court below is squarely contrary to the unanimous[11] ruling of this Court in *Pittman v. Home Owners Loan Corp.*, 308 U. S. 21 (1939). That case involved a Maryland statute which imposed a State recording tax, evidenced by stamps, upon mortgages offered for recordation within the State. The Home Owners Loan Corporation, a now abolished subsidiary of the Federal Home Loan Bank Board,[12] sought to record, without payment of the State tax, a mortgage issued to it as security for loans which the Corporation had made under the Home Owners Loan Act of 1933. Section 4(c) of that Act provided in pertinent

[11] Except for Mr. Justice Butler who did not participate in the case, 308 U. S. at 33.

[12] Congress, as an emergency measure, in 1933 authorized the Federal Home Loan Bank Board to organize the Home Owners Loan Corporation. (See the Act's preamble, 48 Stat. 128, and Section 4(a), 48 Stat. 129.) The Corporation stood in substantially the same relation to the Board as the Federal Home Loan Banks except that eligible "Member" savings and loan associations subscribed to Bank stock, while the Secretary of the Treasury underwrote the Corporation. Section 4(b), Stat. 129. The Corporation was eventually abolished as a separate entity in the reorganization of the Executive Department of the Government. See the statutory references collected in the note to 12 U.S.C. 1463.

part[13] that "[t]he Corporation, including * * * its loans * * * shall likewise be exempt from such taxation," *i.e.*, "from all taxation * * * now or hereafter imposed * * * by any State, county, municipality, or local taxing authority." The Maryland court held the State recording tax inapplicable to HOLC mortgages, and this Court affirmed.

In striking down the State tax, this Court held that it was immaterial who was actually required to pay the recording tax, since "whoever pays it it is a tax upon the mortgage, and that is what is forbidden by the law of the United States" (308 U. S. at 31, quoting *Federal Land Bank v. Crosland*, 261 U. S. 374 at 378-379 (1923). In construing Section 4(c)'s exemption, the Court regarded the word "loans" as the "critical term," and held that "in order to carry out the manifest purpose of the broad exemption" from State taxation, the term "should be construed as covering the entire process of lending, the debts which result therefrom, and the mortgages given to the Corporation as security" (*id.* at 31), since "[b]oth the mortgage and its recordation were indispensable elements in the lending operations authorized by Congress." (*id.* at 32).

Since, as a matter of statutory reading, "Congress ha[d] undertaken to safeguard the operations of the Home Owners' Loan Corporation by providing the described immunity" (*id.* at 33), this Court treated as beside the point

---

[13] Section 4(c), 48 Stat. 128 at 130 (see also 48 Stat. 643 at 644), 12 U.S.C. 1463(c) (1946 ed.), provided as follows:

The bonds issued by the Corporation under this subsection shall be exempt both as to principal and interest from all taxation (except surtaxes, estate, inheritance, and gift taxes) now or hereafter imposed by the United States or any District, Territory, dependency, or possession thereof, or by any State, county, municipality, or local taxing authority. The Corporation, including its franchise, its capital, reserves and surplus, and its loans and income, shall likewise be exempt from such taxation; except that any real property of the Corporation shall be subject to taxation to the same extent, according to its value, as other real property is taxed. (This section is quoted in the *Pittman* decision, 308 U. S. 21 at 31, n. 3.)

contentions that the "tax is not discriminatory" and "does not impose a burden upon" the HOLC (*id.* at 32).[14]

A. The decision of the Supreme Court of South Carolina is in direct conflict with the holding and principles enunciated in *Pittman*. The two Federal statutes involved in this case and in *Pittman* were enacted within a year of each other. They are identical except that the term "advances" appears in 12 U.S.C. 1433 (from the 1932 Act) in the same position that "loans" occupied in Section 4(c) of the Home Owners Loan Act of 1933. This substitution of terms, however, does not affect the identity of meaning of the two provisions, since "loans" and "advances" have the same meaning. "To 'advance' is to 'supply beforehand,' 'to loan before the work is done or the goods made.' This is the popular understanding of the language, as well as the accurate definition." *Laflin & Rand Powder Co. v. Burckhardt*, 97 U. S. 110, 117 (1878).[15] The identity of "loans" and "advances" was likewise the Congressional understanding during the consideration of the Federal Home Loan Bank Act of 1932. Thus, Senator Reed, in offering the amendment to present 12 U.S.C. 1433 so as specifically to exempt from taxation Bank "advances to its members,"[16] pointed out that "[w]e should not, of course, put the **loans** of this new bank in the position of being taxable in several States." 75 Cong. Rec. 14, 659 (72d Cong., 1st Sess.) (emphasis supplied). See also the statement by

[14] This Court also sustained Congressional power to grant the mortgages the immunity from State tax to which Section 4(c) gave expression (308 U. S. at 32-33).

[15] "The term 'advance' is generally used to refer to a payment of money before it is due * * *" (*Commissioner v. Dravo*, 119 F. (2d) 97, 100 (3rd Cir. 1940)), and "unquestionably, it may have the meaning of a loan if * * * used in connection with a promise, express or implied to repay that money" (*Socony Vacuum Oil Co. v. C. M. Johnston & Sons*, 103 F. (2d) 275, 278 (5th Cir. 1939)). See generally 2A Words and Phrases 117-119 (Perm. Ed. 1955), and 1 Oxford English Dictionary 113 (1933) under "Advance" (vb. and n. [8]).

[16] See Part II, *infra* at 15.

Congressman Williams in debate on the 1932 Act, 75 Cong. Rec. 12, 591 (72d Cong., 1st Sess.).[17]

Both provisions—Section 1433 in the present case, and Section 4(c) considered in *Pittman*—grant an equally "broad exemption" (308 U. S. at 31) from State taxation. Like the "loans" in *Pittman*, the term "advances" in Section 1433 should be "construed as covering the entire process of lending," including "the debts which result therefrom and the mortgages" given as necessary security (308 U. S. at 31). *Pittman* sustained the tax immunity of the mortgage phase of the "entire process of lending" contemplated by Congress; the present case involves the equally necessary tax immunity of the "debts which result" from this "process of lending." Furthermore, both the borrower's "note or obligation" and the mortgage or other security are equally "indispensable elements in the lending operations authorized by Congress" (308 U. S. at 32). Both are specifically required by statute as a pre-condition to obtaining an "advance" from the Bank. The "note or obligation" required by Section 1430(c) represents the legally enforceable commitment of the borrower to repay the principal of the "advance" plus interest; the mortgage required by present Section 1430(a) and by old Section 4(c) of the HOLC Act (involved in *Pittman*) gives added assurance that the lending Bank will recover the amount of its "advance" to the borrower.

In debate, it was noted that "[t]hese provisions" (now Sections 1430(a) and (c)) requiring mortgage security and the borrower's note or obligation, were "inserted to provide

[17] "Each member institution [of the Federal Home Loan Bank], within the limitations prescribed, may secure *advances or loans* from the bank upon the note or obligation of the member secured by home mortgages and the stock of the member in the bank," (emphasis supplied). The immediate reference is, of course, to Section 1430(a) ("such advances shall be made upon the note or obligation of the" borrower) and Section 1430(a) ("upon the security of home mortgages, or obligation" of or guaranteed by the United States).

unquestioned safety for the home-loan banks and for the bonds which are to be issued against the home mortgages." 75 Cong. Rec. 12,610 (72d Cong., 1st Sess.) (remarks of Representative Hancock). Both provisions are integral to the "entire process of lending" (308 U. S. at 31) which Congress intended to be unfettered by the taxes of "any State, county, municipality, or local taxing authority" (Section 1433).[18]

The South Carolina tax is thus clearly an indirect impost upon the Bank "advances" which Congress intended to remain immune from State taxes. In *Pittman*, the forbidden recording tax "is imposed upon the mortgage and is graded according to the amount of the loan * * *" (308 U. S. at 31). Likewise, South Carolina's documentary stamp tax "is imposed upon" the association's "note or obligation," and the amount of the tax similarly "is graded according to the amount of" the "advance" for which the required "note or obligation" is given.

B. The South Carolina court sought to avoid *Pittman*'s impact on two grounds. First, it stated that since the mortgage in *Pittman* was "offered for record" by the HOLC itself, "[i]t is readily apparent that the rule there announced is not applicable under the factual situation here" (R. 19). But the short answer to this contention is that "whoever pays" the tax—whether the Bank which makes the "advances", or petitioner who can secure such "advances" only upon its "note or obligation" (Section 1430(*c*)—"it is a tax upon" the Bank's tax-free "advances," and "that is what is forbidden by the law of the United States." *Pittman* case, *supra* at 31; *Federal Land Bank v. Crosland*, 261 U. S. 374 at 373-379 (1923). Indeed,

[18] Section 1433 also confers a like exemption from "all taxation now or hereafter imposed by the United States, by any Territory, dependency, or possession thereof."

Pittman itself specifically rejected an attempt to distinguish the *Crosland* case in terms of the party to the loan transaction actually paying the tax. See 308 U. S. at 30-31.

Secondly, *Pittman's* principles are no less applicable because the Home Owners Loan Corporation may well have been, by its very nature, a tax-immune Federal "instrumentality or agency"—a factor apparently considered by the South Carolina court as distinguishing *Pittman* from the present case (see R. 18-19). But as we have shown, the tax exemption recognized by *Pittman* rests, not upon a constitutional immunity for a "Federal instrumentality," but solely upon a statute which is identical in every relevant respect to Section 1433.[19] Because of respondent's efforts to inject the "federal instrumentality" concept into the present case (see Br. in Opp. at pp. 2-4) we stress here, as in the Petition for Certiorari (Pet. at p. 11, note 9),[20] that the issue here is exclusively one of the proper construction of the Federal statutes which embody the tax immunity Congress has chosen to confer upon Bank-association loan transactions. On this issue of statutory interpretation, the *Pittman* decision is controlling.

II.

The legislative history of the Federal Home Loan Bank Act of 1932 also reflects the importance which Congress came to attach to the specific tax immunity of Bank "ad-

[19] The only constitutional issue *Pittman* decided was that the statutory tax immunity of HOLC lending operations was within the "constitutional authority" of Congress to grant (308 U. S. at 33), *i. e.*, there is "a stated immunity created by Congress in the exercise of a constitutional power" (*Esso Standard Oil Co. v. Evans*, 345 U. S. 495, 500 (1953) (citing *Pittman* case). See also *Carson v. Roane-Anderson Co.*, 342 U. S. 232, 233-234 (1952), noting "[t]he constitutional power of Congress to protect any of its agencies from state taxation", and citing *Pittman*. Respondent does not question the constitutionality of the immunity granted by Section 1433, but only denies that the immunity covers the present tax.

[20] See also Memorandum for the United States as *Amicus Curiae*, supporting the Petition for Certiorari in the present case, at page 3, note 2.

vances" to members such as petitioner. The bill originally did not specifically exempt advances, but provided that "the bank, including its franchise, its capital, reserves, and surplus, and its income shall be exempt" from taxation (see 75 Cong. Rec. 13, 108), and in that form it passed the House (75 Cong. Rec. 13, 112). Thereafter, on the Senate floor an amendm[illegible] was proposed and promptly accepted to make specific the tax exemption for "its [the Bank's] advances to members." Senator Reed, who offered the amendment, explained that:

> We should not, of course, put the loans of this new bank in the position of being taxable in the several States. I do not believe they would be, anyway, as they are part of its capital and reserves, but this would make it clear that the bank's assets are not in fact taxable by the State or municipalities. (75 Cong. Rec. 14,659.)

Following Senate passage of the bill as amended (75 Cong. Rec. 15,095), the bill went to Conference, which concurred in the specific tax exemption for Bank "advances" but extended it to qualified non-members as well as to members (as the Senate amendment provided). H.R. Rep. No. 1775, 72d Cong., 1st Sess. 2 ("Amendment numbered 32"); H.R. Rep. No. 1782, 72d Cong. 1st Sess. 2(same). The House managers stated:

> This is a clarifying amendment to make certain that advances by home loan banks to members are tax exempt. The House recedes with an amendment applying the provision to all advances. (H.R. Rep. No. 1775 at 6; H. R. Rep. No. 1782 at 6.)

This version was eventually accepted by both Houses (see 75 Cong. Rec. 15,731 and 15,600) and in this form became present Section 1433.

III.

Contrary to the holding of the South Carolina court, Section 1464(b) (Section 5(h) of the Home Owners' Loan Act of 1933, 12 U.S.C. 1464(h)), does not authorize the present tax which, as we have shown, is invalid under Section 1433 and the *Pittman* decision.

The Home Owners' Loan Act provided for the establishment of Federal savings and loan associations, and then relieved them of all State taxes except those specifically authorized by Section 1464(h). That section consents only to non-discriminatory State imposts upon a Federal association's "franchise, capital, reserves, surplus, loans or income." The issue here is whether this limited consent to non-discriminatory State taxation repeals in whole or in part Section 1433's specific prohibition against State taxation of Bank-association loan transactions, and we submit that it clearly does not.

Section 1464(h)'s consent to non-discriminatory State taxation of an association's "loans" clearly refers to loans made by the association to **their** borrowers, such as home purchasers, and not to loans between Bank and association. Similarly, the amount of "advances" which the association is legally obligated to repay to the Bank cannot be deemed either "surplus" or "income" of the association, for purposes of State taxation. The court below did not indicate any other basis for its conclusion that "the very terms of the statute [1464(h)]" grants the States "the specific right to tax" Federal and local associations alike on notes given for advances received from the Bank (R. 23).

Absent clear Congressional consent, Section 1464(h) should not be read to sanction a State tax which in substance and effect falls upon Bank "advances" specifically exempt under Section 1433. Such a reading would thwart the "manifest purpose of the broad exemption" of Section

1433 which, as *Pittman* recognized (308 U. S. at 31), "should be construed as covering the entire process of lending between" Bank and Association. Again, there is no legislative history tending to show that Congress intended, either in the original enactment of Section 1464(h) or in any of the numerous amendments to it, to validate such taxes as South Carolina has imposed here.[21]

Finally, this reading of the statute raises difficult and substantial problems which should be avoided unless the language of Section 1464(h) makes it inescapable. Thus, on adopting the lower court's construction, there arises a substantial question whether the tax, although non-discriminatory, is an invalid exaction upon essential activities of a Federal instrumentality; and, indeed, the opinions below expressly took a position on that vexing issue.[22] Similarly the State court's construction would inevitably present questions whether a given State tax is so burdensome as to interfere with Bank-association loan transactions. Such problem should not be evoked without a clear showing that Congress intended to allow States to tax these loan transactions.

Under these circumstances we submit that the State court erred in holding that the "provisions of 12 U.S.C.A. 1464(h) are clear, unambiguous and unequivocal" and that "Congress [has] expressly granted to the [State] taxing authority the right to impose and collect "such taxes as

[21] Although no less than nine amendments or revisions of Section 1464 occurred after *Pittman*, Congress did not at any time disapprove that decision, or attempt either here or elsewhere to endorse State taxes of the kind outlawed in *Pittman*. These revisions are listed in the "Note" to Section 1464 in the United States Code. Subsection (h) was itself amended in 1951 (65 Stat. 490). It previously had been amended in August 1939 (53 Stat. 1402)), prior to the *Pittman* decision in November 1939 (see 308 U. S. 21), but four months after the grant of certiorari on April 17, 1939 (306 U. S. 628) and long after the Maryland decision on December 1, 1938 (175 Md. 512, 2 A. (2d) 689) which this Court unanimously affirmed.

[22] As already noted, we consider resolution of this issue unnecessary to the disposition of this case. See notes 19 and 20.

South Carolina assessed here" (R. 23). The fact stressed by the court (see R. 21-22) that the tax is non-discriminatory is beside the point, since no State tax is valid unless Section 1464(h) permits it.

IV

Although the statutory language, the legislative history, and the *Pittman* decision establish the invalidity of the South Carolina stamp tax, we nevertheless point to policy considerations supporting this conclusion.[23]

The Federal Home Loan Bank system was established in 1932 "to place long-term funds in the hands of local institutions." H.R. Rep. No. 5418, 72d Cong., 1st Sess. 8. Such action was prompted by the fear that "we are drifting into a nation of tenants," then due chiefly to an insufficiency of "low-cost long-term installment mortgage money," (*id.* at 8), and the inability of state-chartered "building and loan associations" to meet the need (*id.* at 9). Accordingly, Congress sensed the need to "decrease costs of mortgage money", "with resulting benefit to home ownership in the form of lower costs and more liberal loans" (*id.* at 10).

The Home Owners Loan Act of 1933 provided "direct relief to home owners" (through the HOLC) (H. Rep. 55, 73d Cong. 1st Sess. 1-2), without, however, "disturb[ing] the functioning of the Federal home-loan bank system" (*id.* at 1). A major permanent objective of the 1933 Act was to establish "local mutual thrift institutions in which people may invest their funds" and "to provide for the financing of homes." Section 5(3) 44 Stat. 132, 12 U.S.C. 1464(a); see also Section 6, 44 Stat. 134, 12 U.S.C. 1465. These are

[23] Since the validity *vel non.* of the tax turns upon the statutory language, absence of financial injury to the associations or the Bank cannot sustain the tax. In pointing to the economic impact of the tax, we do not infer invalidity from injury, but only argue that the probable injury shows that Congress did not intend to authorize such a tax, and that, at all events, such authorization should not be implied from a strained reading of the statute.

the Federal savings and loan associations. Although prompted by the immediate need for home financing "in communities [then] insufficiently served by any institution or other lender on homes" (H.R. Rep. No. 55, 73d Cong., 1st Sess. 2; see S. Rep. No. 91, 73d Cong., 1st Sess. 2-3), these Federally chartered institutions "are intended as permanent associations to promote the thrift of the people locally to finance their own homes and the homes of their neighbors" (H.R. Rep. No. 55 at 2; see S. Rep. No. 91 at 2-3).[24] They are "created, insured, and aided by the Federal Government", (*Fahey v. Mallonnee*, 332 U. S., 245, 250 (1947)) as a part of a continuing "comprehensive legislative program" implemented by "large appropriations" from Congress (*Fahey v. O'Melveny & Myers*, 200 F. (2d) 420, 465 (9th Cir. 1952); their "close financial relationship" with the Government reflects their "many special privileges and advantages" and "peculiar status" under the Federal legislative scheme (*id.* at 465).

Such taxes as South Carolina and other States have imposed interfere with the Congressional purpose to make home financing opportunities widely available at minimal cost to the ultimate homeowner-borrower. In the aggregate, the taxes, both upon petitioner's individual transactions and upon all borrowing associations,[25] are substantial in

---

[24] In debate, Chairman Reilly of the House Banking and Currency Committee (which reported the bill destined to become the Federal Home Loan Bank Act of 1932), pointed out that "[t]his bill will furnish to the much larger army of small-home owners *in ordinary times* borrowing facilities that will be beneficial to the small-home owner (and to prospective home-owners)." 75 Cong. Rec. 12,588 (72d Cong., 1st Sess.) See also Cong. Hancock, *id.* at 12,612 ("This legislation is intended to stimulate home ownership in normal times") as well as in a depression.

[25] For petitioner alone, a median size institution, the State tax on its notes to the Greensboro Bank (of which it is a member) amounted to $2,270.00 for the four-year period August 12, 1953-October 7, 1957 (R. 6). As of December 31, 1959, outstanding advances from the Greensboro Bank to its 70 South Carolina member associations (consisting of 43 Federal, and 27 State chartered institutions) amounted to $21,076,000. 1959 Ann. Rep. FHL Bank of Greensboro at 14-15. On the "notes or obligations" required by 1 U. S. C. 1430(c) to obtain these advances, the South Carolina tax payable amounts to $8,430.00.

dollar amount. These tax charges, moreover, are necessarily passed on by the associations in the form of increased home-financing costs to their homeowner-borrowers. Congress, however, in the closely related 1932 and 1933 enactments was vitally concerned to secure the lowest net borrowing costs to "[t]he home-owner, who, after all, is the backbone of our Nation" (H.R. Rep. No. 1418, 72d Cong., 1st Sess. 10-11), and especially to the "wage earner and people in the humbler walks of life" (*id.* at 11). Indeed, concern for the "little fellow" and "frugal wage earners" was constantly in evidence in the debates on the 1932 statute. 75 Cong. Rec. 12,575, 12,588, 12,604, 12,606, 12,611-12, 12-627 (72d Cong. 1st Sess.). Each additional charge which must be passed on to the ultimate borrower contributes to the stringency of funds for home-building. In a period of relatively high interest rates the impact of any such increase mortgage fund costs is magnified, especially to the "little fellow".[26]

The imposition of State taxes (and other charges) has an additional adverse effect on the associations. The current high interest rates and decreased homeowner borrowing, coupled with obligations to pay reasonable dividends to depositors who entrust their savings to the associations, has placed such pressure upon association profits that the amount of money available for "loss reserves" is shrinking. These "loss reserves" must be adequate to safeguard the amount of savings made by depositors, and as these reserves are reduced, the financial integrity of the associations is lessened, and the incentive to invest in a traditionally safe medium will fall with a corresponding loss of funds

[26] In September 1960, the Chairman of the Federal Home Loan Bank Board was reported as urging Federal savings and loan associations to reduce dividends paid to savings depositors so that mortgage interest rates (the chief income source of the associations) may be correspondingly lowered. "In our zeal to pay a higher return to investors, we must not overlook the basic concept of economical home financing on which this industry was founded." *Wall Street Journal*, September 4, 1960. See report of a similar statement by the Chairman, *Wall Street Journal*, December 7, 1960, p. 10, col. 2.

available for homeowner-borrowers. Congress, however, sought "[t]o encourage the people to save their own funds for their own use in these associations" (H. Rep. 55, 73d Cong. 1st Sess. 2), and thereby "to raise substantial sums of money from private savers" for lending (S. Rep. 91, 73d Cong. 1st Sess. 2-3). The addition of such charges merely increases the pressures which reduce the amount of the necessary "loss reserves."

In sum, the State tax imposed here merely injects another expense which associations such as petitioner must meet, and at the same time maintain reasonable interest rates on home mortgages, satisfactory dividend rates to depositors, and the reserves necessary to secure those deposits. If South Carolina can exact this impost, so may every other State. These considerations point to the unwisdom of reading into the statutory scheme an implied authorization for States to impose upon Bank-association loan transactions charges and taxes which inevitably enhance the costs of funds.

Respondent suggests that to give effect to the tax exemption of Federal associations is to award an "exceptional advantage" to them vis-a-vis "State chartered associations hav[ing] the same laudable purposes" (Br. in Opp. 5).

This is true only on the supposition that the statutory scheme awards a tax exemption only to Federal associations, and not to State-chartered associations. Since there is no occasion to take a position on this question we note only the likelihood that Section 1433 would probably grant the same protection to the "notes or obligations" issued by State associations obtaining advances from the Federal Home Loan Bank, since what the State tax here inhibits is the "entire process of lending", which includes the "debts which result" from the loan (to any association-borrower),

(*Pittman* case, 308 U. S. at 311). Ultimately, the fact that South Carolina might elect to continue collecting the tax from its State associations is no argument for imposing the same burden upon Federal associations. Rather the solution is for South Carolina to remove the burden from the State associations by statutory action, if, indeed, statutory action is required.

CONCLUSION

It is respectfully submitted that the judgment of the Supreme Court of South Carolina should be reversed.

FRANK K. SLOAN,
ERNEST L. FOLK, III,
Columbia, S. C.,
Counsel for Petitioner.

Of Counsel:

W. HUMMEL HARLEY,
Laurens, S. C.
THOMAS H. POPE,
ROBERT D. SCHUMPERT,
REMBERT D. PARLER,
Newberry, S. C.

January 4, 1961.